

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2597

PETITION OF AVALON BAY COMMUNITIES, INC.

OPINION OF THE BOARD

(Effective Date of Opinion: June 23, 2004)

Case No. S-2597 is an application for a special exception pursuant to Section 59-G-2.36.2 (dwellings in a commercial or industrial district) of the Zoning Ordinance to permit the development of 106 one bedroom apartment homes; 90 two bedroom apartment homes, 274 parking spaces, and recreational facilities on 10.8 acres of property. Pursuant to the provisions of Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner for Montgomery County to conduct a public hearing and submit a written report and recommendation to the Board for final action. The Hearing Examiner convened a public hearing on March 19, 2004, the record in the case closed on March 31, 2004, and on May 4, 2004, the Hearing Examiner issued a report and recommendation for approval of the special exception.

Decision of the Board: Special Exception granted subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on June 9, 2004. After careful consideration and review of the record in the case, the Board adopts the report and recommendation and grants the special exception, subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of the Petitioner's witnesses and representations of counsel identified in this report, including the Design Plan and Landscape Plan, Exhibits 28 (a) through (d).
2. The special exception must be limited to a total of 196 units, including 35 percent productivity housing units.
3. The Petitioner must obtain approval of an amended preliminary plan of subdivision and site plan from the Planning Board prior to the release of any building permit.
4. The Petitioner must comply with the stormwater and sediment control regulations of the Montgomery County Department of Permitting Services ("DPS"), and must obtain DPS approval of a stormwater management concept plan before the Planning Board hearing on the preliminary plan.

5. Identification signage shall be limited to five signs, two at each of the driveway entrances and one near the corner of Diamondback and Decoverly Drives. Sign lighting must not result in illumination greater than 0.1 foot candles across any property line.
6. The Petitioner must submit to the BOA a copy of the sign permits obtained and any variance required, as well as a visual representation of the signs erected.
7. The Petitioner must submit to the BOA a copy of the final wetlands permit.
8. The Petitioner must comply with the conditions approval of the Forest Conservation Plan prior to release of sediment and erosion control permit. Conditions of approval shall include treating the tree save area by:
 - a. Removal of Multifora rose (Rose multiflora) and other non-native invasive species;
 - b. Enrichment planting in gaps and open areas of stream and wetland buffers; and
 - c. Approval of a planting plan by MNCPPC prior to the release of sediment and erosion control permits.

On a motion by Angelo M. Caputo, seconded by Allison Ishihara Fultz, with Donna L. Barron and Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 23rd day of June, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition S-2597, filed on November 25, 2003, requests a “Dwellings” special exception to build and manage a rental apartment community on property classified under the O-M Zone, located at the northeast corner of Diamondback Drive and Decoverly Drive in Gaithersburg, Maryland, and comprised of Parcels N33 and N195 as identified on the tax map (also identified as Parcel MM on Plat No. 17632 and Parcel NN on Plat No. 18850, respectively).

Technical Staff of the Maryland-National Capital Park & Planning Commission (“MNCPPC”) reviewed the petition and, in a report dated March 5, 2004, recommended *approval* with conditions.¹ See Ex. 23. The Montgomery County Planning Board (“Planning Board”) reviewed the petition on March 11, 2004 and voted 5 to 0 to recommend *approval* with the conditions recommended in the Staff Report. See Ex. 24.

By Resolution adopted January 7, 2004 the Board of Appeals (“BOA”), acting under the provisions of Code § 59-A-4.125, referred this petition to the Office of Zoning and Administrative Hearings to conduct a public hearing and submit a report and recommendation. See Ex. 22. By notice dated January 14, 2004 a public hearing before the Hearing Examiner was scheduled for March 19, 2004. The public hearing was convened as scheduled, at which time testimony and evidence were received in support of the petition. No opposition was presented either at the hearing or in writing. The record was held open for the receipt of supplemental submissions by the Petitioner and Technical Staff, and closed on March 31, 2004.

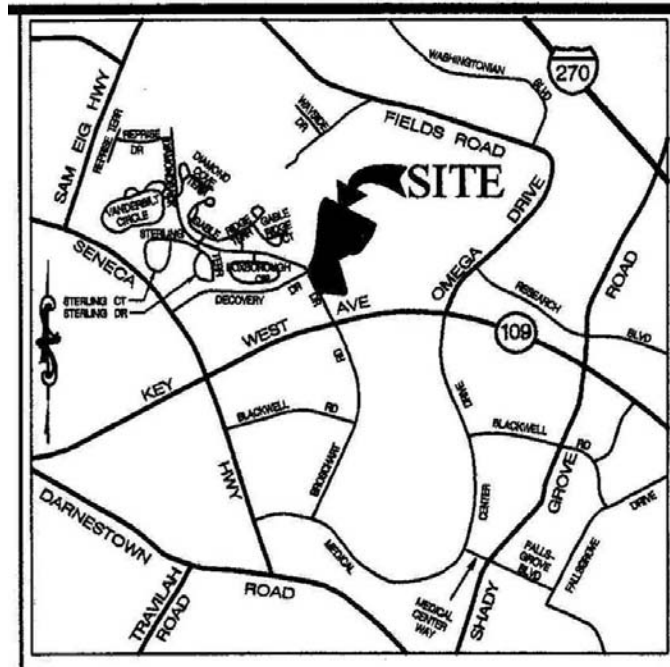
II. BACKGROUND

A. *Subject Property and Neighborhood*

The subject property contains approximately 10.8 acres of land located in the northeast quadrant of the intersection of Diamondback Drive and Decoverly Drive, approximately 500 feet northeast of the intersection of Diamondback Drive and Key West Avenue (MD 28) in Gaithersburg. The property is comprised of two recorded parcels, Parcel MM at the north end of the site, with 6.9

¹ The Staff Report is liberally quoted and paraphrased in Part II of this report.

acres of land, and Parcel NN at the south end, with 3.9 acres. The combined property is irregular in shape. It has approximately 250 feet of frontage on Diamondback Drive and 900 feet of frontage on Decoverly Drive. The subject property contains a substantial wooded area, as well as a stream valley, flood plain areas and wetlands. The shape and general location of the property are shown on the vicinity map below, excerpted from Exhibit 28(a).



The stream that runs through the subject property is fed by a large stormwater management pond that is located immediately upstream on the abutting property. The pond provides stormwater quantity control for the adjoining Decoverly Hall office complex, and may also serve parts of the subject property. The subject property was subdivided into Parcels MM and NN as part of the subdivision carried out for the Decoverly Hall office complex, but was left undeveloped. It is now under contract for sale to the Petitioner, which owns and operates a rental housing complex known as "Avalon at Decoverly," located across Decoverly Drive from the subject property. The development proposed on the subject property would be called "Avalon at Decoverly Two," and would share recreational facilities and management with the existing Avalon at Decoverly.

The relationship of the subject property to surrounding land uses is shown on the aerial photo reproduced on the next page. To the east and south, the subject property abuts the Decoverly

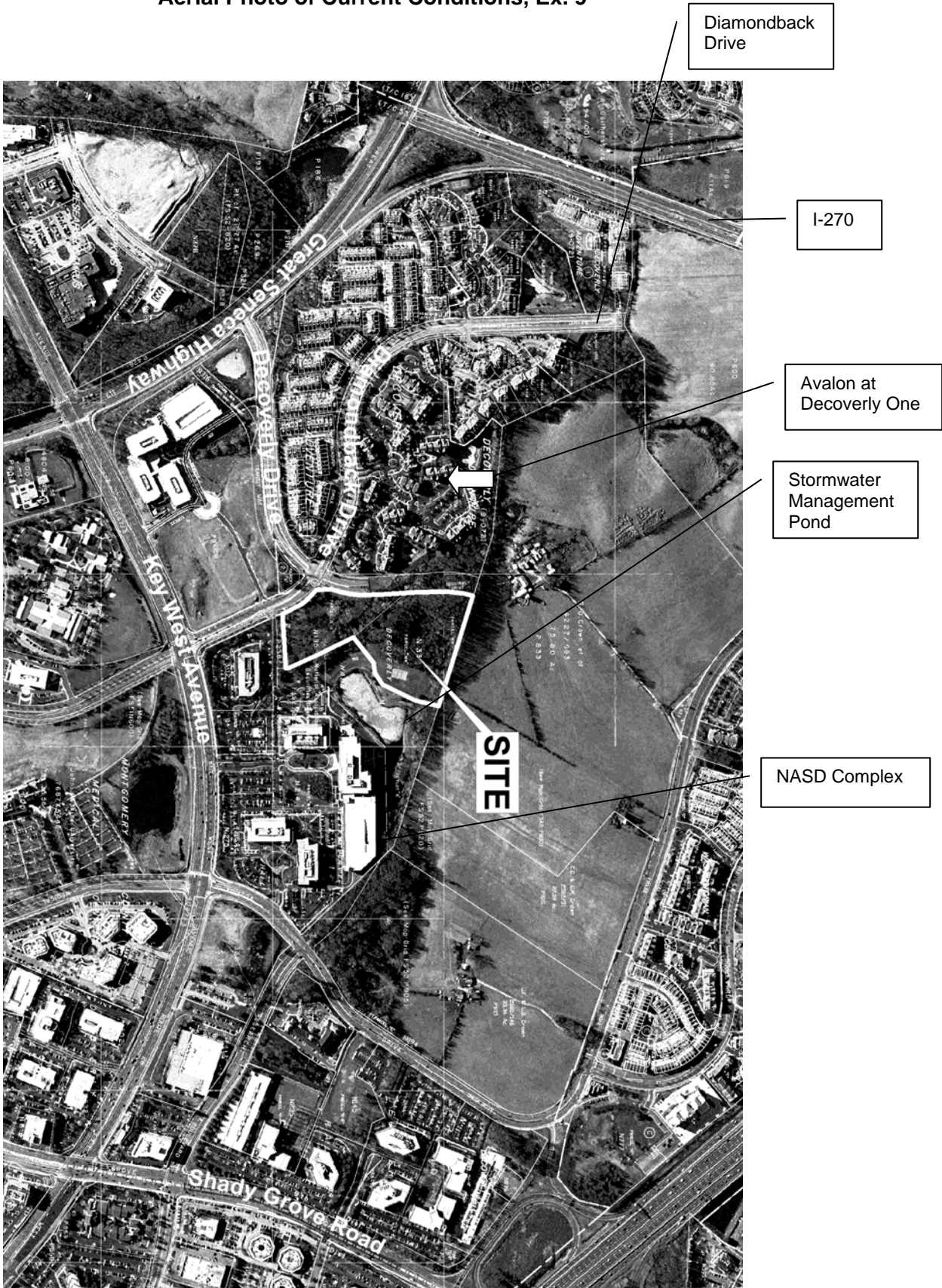
Hall office complex, occupied primarily by the National Association of Securities Dealers ("NASD"). Further south, across Key West Avenue, is the Life Sciences Center. To the west the property line conforms to the curves in the local roadways, with frontage on both Diamondback and Discoverly Drives. Confronting across Diamondback Drive is an undeveloped parcel of land classified under the I-3 Zone (Technology and Business Park). This property is slated for development as part of an office park that has been only partially built. Confronting the subject property directly across the intersection of Diamondback and Discoverly Drives is a townhouse community on land classified under the R-60/TDR Zone. Confronting across Discoverly Drive, north of Diamondback Drive, is the Avalon at Discoverly apartment complex owned and operated by the Petitioner. To the north, the subject property abuts the Crown Farm, a large tract of farm land that remains in agricultural use, although it is zoned for single-family development and recommended in the applicable master plan for fairly high densities. Immediately north of the Crown Farm is the Washingtonian shopping center.

Technical Staff and the Petitioner's land planner, Al Blumberg, describe the general neighborhood that might be affected by the proposed special exception as the area roughly encompassed by Key West Avenue on the South, Omega Drive to the east, Great Seneca Highway on the west and the Crown Farm to the north. The Hearing Examiner also adopts this description. Mr. Blumberg's map of the surrounding neighborhood is reproduced on page 7. The surrounding neighborhood contains essentially the adjoining and confronting uses described in the previous paragraph, which are a mix of commercial uses, residential development and farmland.

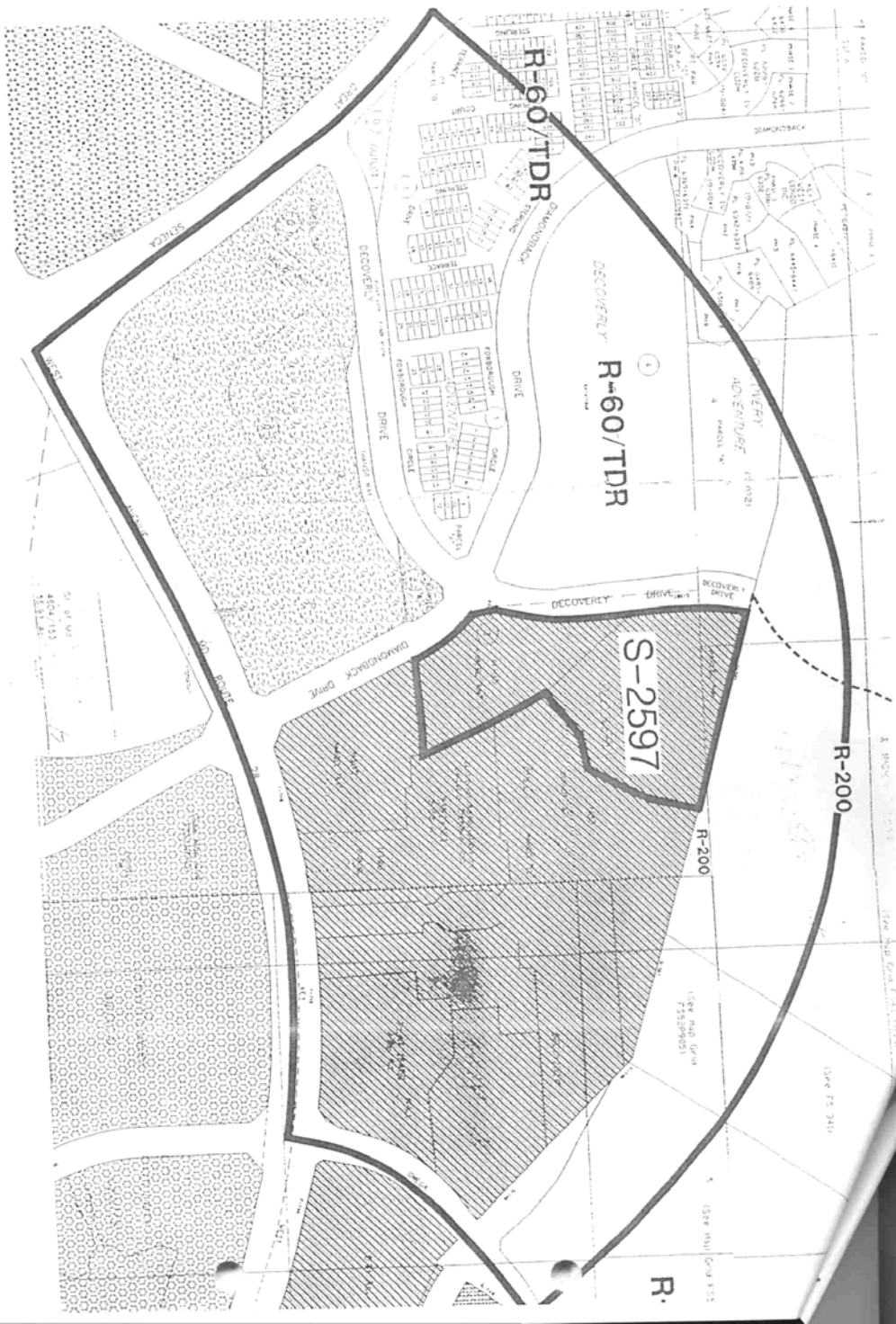
B. Proposed Use

The Petitioner, Avalon Bay Communities, Inc., proposes to construct a mixed-income rental apartment complex on the subject property, to be operated as Phase Two of the neighboring Avalon at Discoverly rental complex. The development would consist of 196 garden apartments in two sections, separated by the stream valley. The southern section, closest to the intersection of Discoverly

Aerial Photo of Current Conditions, Ex. 9



Surrounding Neighborhood Map, Ex. 19(a) at 5.



and Diamondback Drives, would have a single building with 14 one-bedroom units and 14 two-bedroom units, for a total of 28 units. The larger section, at the north end of the site, would consist of five buildings with a total of 168 units, comprised of 92 one-bedroom units and 76 two-bedroom units. The total of 106 one-bedroom units would include 37 Productivity Housing units, which are reserved for households with incomes at and below 75 percent of the area-wide median income.² Productivity housing units would be spread throughout the development.

The apartment buildings would be a combination of three- and four-story structures. Parking would be primarily in surface parking lots, with a small number of garages available for rent (five garage structures are planned, with four spaces each). The complex as a whole would have 274 standard-size and handicapped-accessible parking spaces, above the minimum requirement of 268 parking spaces.³ The complex would have an additional 53 spaces sized for compact cars, increasing the ratio of parking spaces to 1.67 spaces per dwelling unit. The Applicant noted that it proposes to far exceed the number of spaces required by law because it believes the Zoning Ordinance vastly underestimates the number of parking spaces needed by today's apartment dwellers.

Discoverly Drive currently extends north from its intersection with Diamondback Drive only as far as the entrance to the existing Avalon at Discoverly complex. Thus, it terminates about one-third of the way along the subject property's western boundary. In connection with the proposed development, the Petitioner would be required to extend Discoverly Drive along the full western frontage of the subject property. The Petitioner proposes to construct the extension of Discoverly Drive as a two-lane road, with a transition to the four-lane width of the existing portion of Discoverly Drive. Transportation Planning Staff at the MNCPPC have opined that this extension, which would serve only the proposed development, would be adequate as proposed. See Supplemental Staff

² As provided for in Chapter 25, Article IV of the Montgomery County Code and Executive Regulation 19-98.

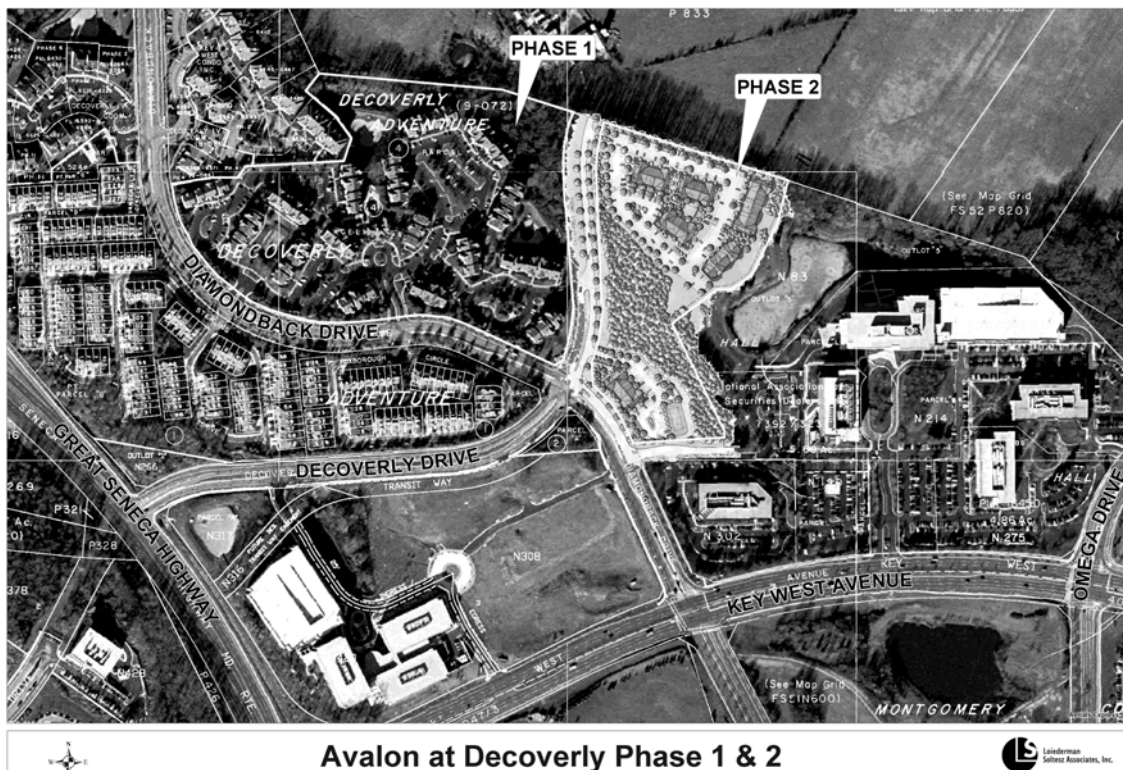
³ The Zoning Ordinance requires 1.25 spaces per one-bedroom unit and 1.5 spaces per two-bedroom unit. These requirements would be exceeded both for the project as a whole and for each of the two sections at either end of the site.

Report, Ex. 41. Final approval by the Department of Public Works and Transportation would be required during preliminary plan review.

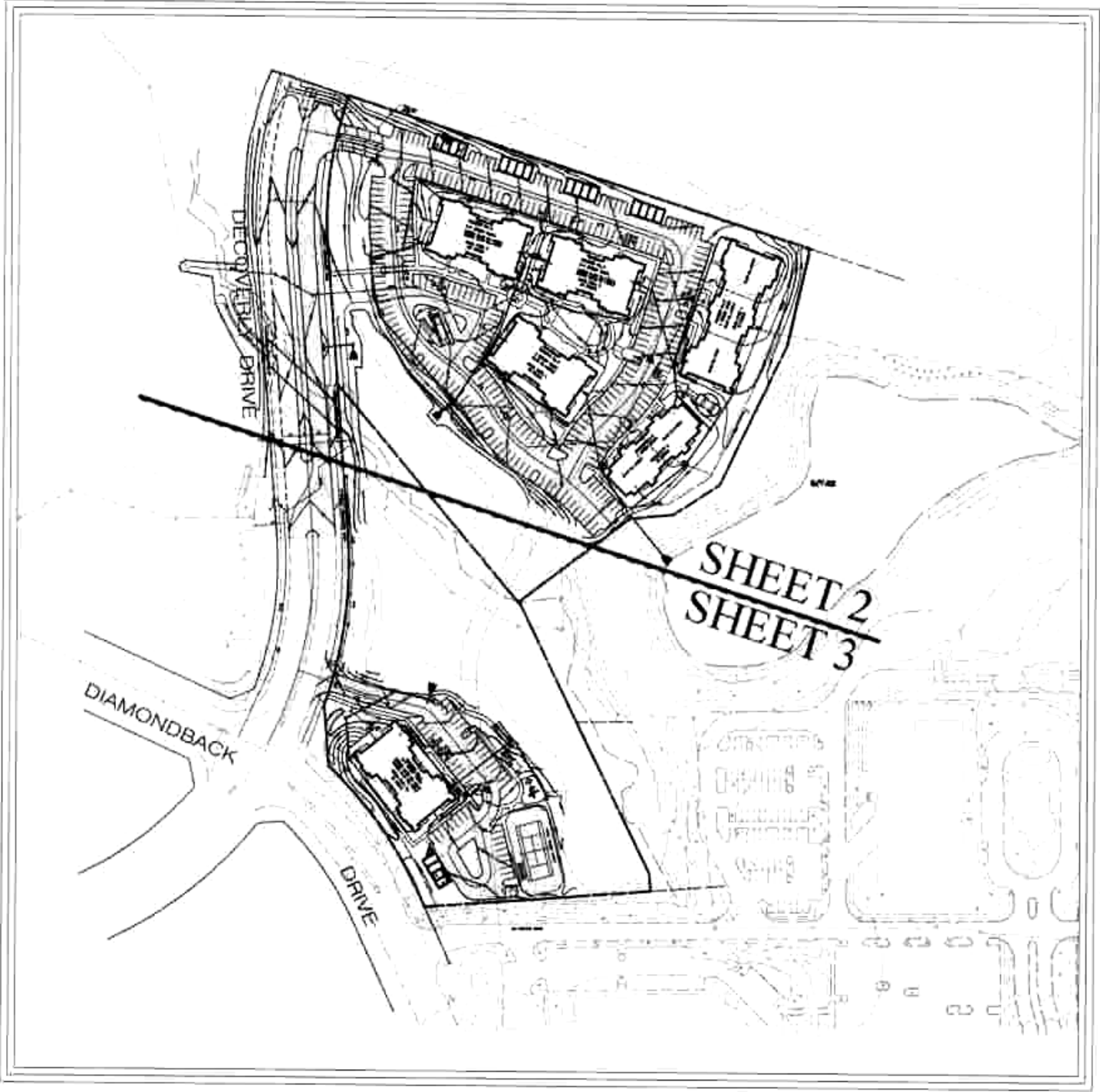
The proposed development would have an extensive network of sidewalks and trails within each of the two development areas, as well as a wide, eight-foot sidewalk along the extended Discoverly Drive to connect the two areas. On-site recreational facilities would include a tennis court, a tot lot, picnic and sitting areas, a gazebo and an open play area. In addition, the Petitioner plans to renovate the existing clubhouse at the neighboring Avalon at Discoverly complex and build a new fitness center, both of which would serve residents of Avalon at Discoverly One and Two.

The aerial photograph below shows the subject property and part of the surrounding neighborhood, with an artist's rendering showing what the proposed development might look like on the site. The three-page Design Plan (site plan) for the proposed development is shown on pages 10 and 11.

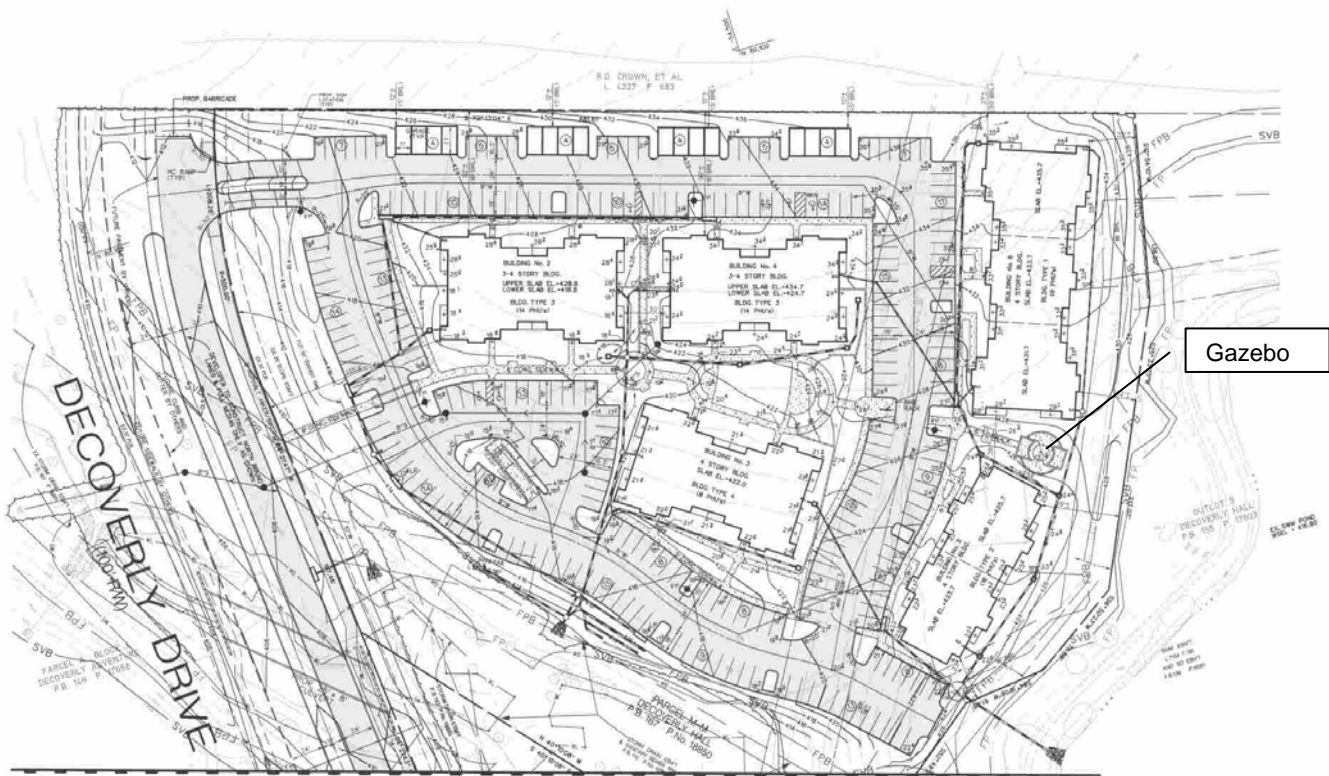
Aerial Photo Illustrating Proposed Development, Ex. 30



Overall Design Plan, Ex. 28(a)



Design Plan for Northern Part of Site, Ex. 28(b)



Design Plan for Southern Part of Site, Ex. 28(c)



C. Master Plan

The subject property is in the area covered by the *1990 Shady Grove Study Area Master Plan* (the “Master Plan”). The Master Plan recommends extensive development of employment uses in the Shady Grove Study Area, building on the Life Sciences Center and R&D (research and development) uses in the area. To provide housing for the employees filling those jobs, one of the plan’s objectives was providing for a broad mix of residential units, including affordable housing. The Master Plan encourages a mix of housing types including higher densities and multi-family unit types, to promote the availability of low- and moderate-income housing.

The Master Plan has no textual recommendations specific to the subject property. The Master Plan has a “Land Use and Design Concepts” drawing (Figure 4.2, page 24), which includes the subject property among the generalized locations recommended for residential development. However, on the more detailed Land Use Plan (figure 5.1, p. 49 and fold-out), the subject property was included in an area designated for office use. The Land Use Plan recommends residential use of the confronting property that has been developed with Avalon at Decoverly One. It also recommends residential use of most of the Crown Farm, with the portion now zoned R-200 shown at a density of eight dwelling units per acre, and most of the area now zoned R-60/TDR shown at a density of 20-25 d.u./acre. A portion of the area zoned R-60/TDR is shown as park land. The Master Plan also recommends two transit stations on the Crown Farm, one in close proximity to the subject property.

Technical Staff notes that the subject property’s current O-M zoning classification was recommended in the Master Plan, and that residential dwellings are permitted in the O-M Zone by special exception provided certain standards are met, including compatibility. Staff found that housing on the subject property would be compatible with both surrounding development and the future development of the Crown Farm envisioned in the Master Plan. Staff further concluded that additional housing is needed to balance the jobs at the Life Sciences Center, and that productivity housing would be beneficial to the area. Accordingly, Technical Staff opined that the proposed residential

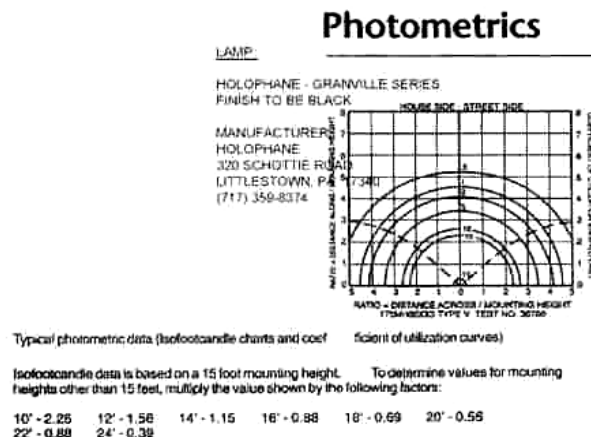
dwelling special exception would be in conformance with the recommendations of the Master Plan. See Ex. 23 at 11.

D. Landscaping, Lighting and Signage

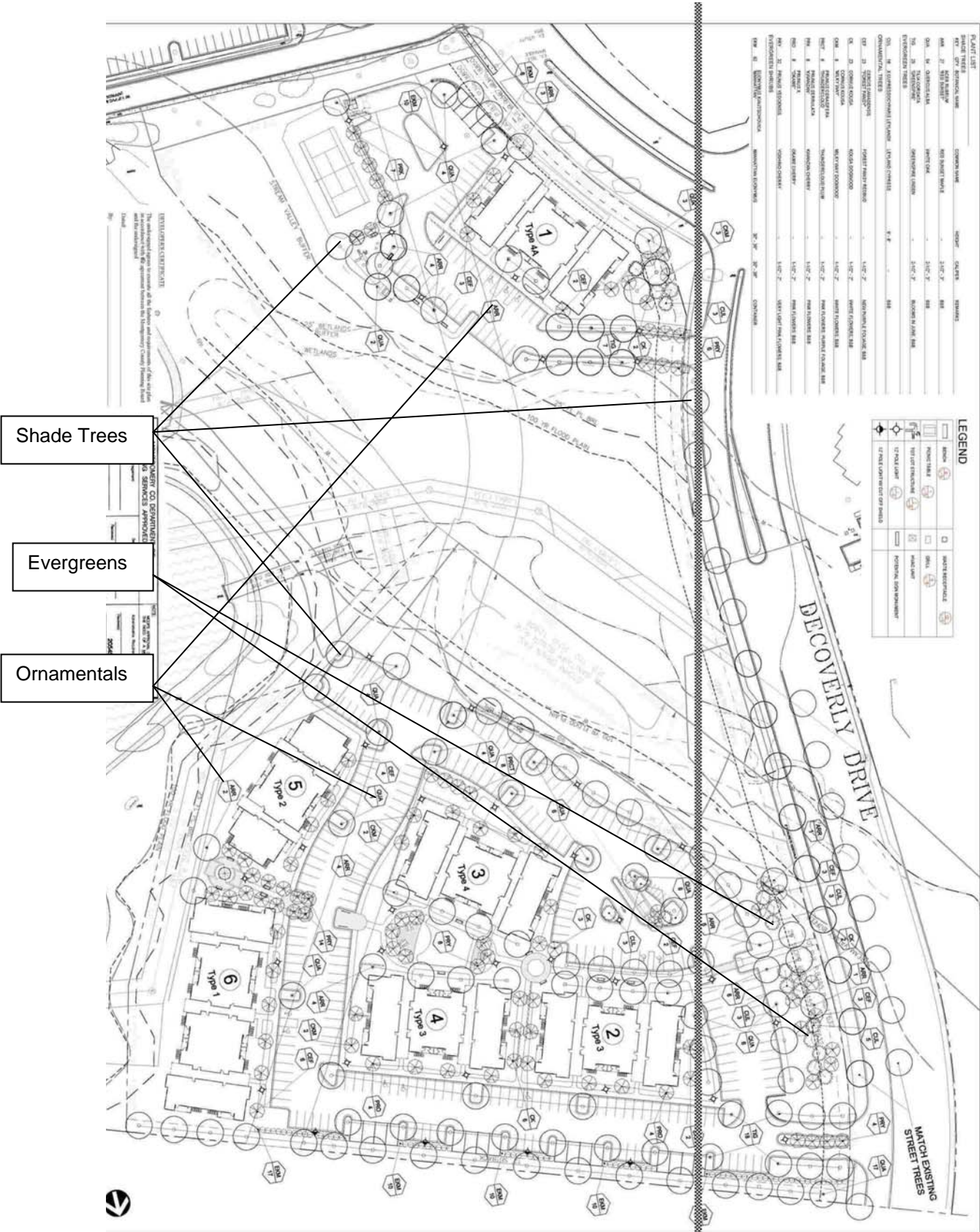
The submitted plans depict significant landscaping and buffers, including shade trees, ornamental trees, shrubs, grasses and perennials, as well as areas with special paving and sidewalks. Most of the areas proposed for development abut roadways. The only portion of the property where buildings or parking lots would abut land other than a roadway is along the northern border with the Crown Farm. Along that border, the landscape plan includes shade trees planted along the backs of the garages and evergreen shrubs along the parking spaces between the garages. The Landscape Plan, Exhibit 28(d), is shown on the next page.

Exterior lighting would consist of lighting fixtures mounted on 12-foot poles, which would be located throughout the built portions of the site along pathways and in the parking lots. At the suggestion of Technical Staff, the Applicant revised its lighting plans to include shields that would prevent unwanted illumination from intruding on residents of the development or the Crown Farm. As depicted on the final Lighting Plan, Exhibit 40(a), the levels of illumination would not exceed 0.1 foot candles at any point along the property lines, with the exception of roadway frontage where existing street lights lead to higher levels of illumination. The photograph below depicts the lighting fixture the Petitioner proposes to install on the pole lights.

Proposed Lighting Fixture, Ex. 28 (i)



Landscape Plan, Ex. 28(d)



The Petitioner proposes to install a total of five identification signs for the development: two at each of the two driveway entrances (one on either side) and a fifth at the intersection of Decoverly and Diamondback Drives. The signs would be of masonry construction with a stone or brick veneer, and would be illuminated by small ground lights. The Applicant represented that that sign lighting would not result in any illumination across the property lines above 0.1 foot candles. Tr. at 84-85. The sign proposed at the intersection would be larger than the other two, with the base measuring roughly six feet by 15 feet. The Applicant indicated that the sign for the proposed development would be similar to the sign for the existing Avalon at Decoverly, depicted on the following page, which sits across the street from the location proposed for the new sign. The Petitioner expects all of its signs to conform to County sign regulations, but agreed to a condition of approval that would require it to submit to the Board of Appeals a copy of any sign variance that may be necessary and a picture of the approved sign.

Illustrative Example of Sign Proposed at Intersection, Ex. 32



E. Traffic and Transportation

The Master Plan calls for a major transit by-way, the Corridor Cities Transitway ("CCT"), to run along the Decoverly Drive frontage of the subject property, with a transit stop within easy walking distance of the property. The Design Plan for the proposed special exception shows a 50-foot right-of-way for the CCT, as required, as well as a ten-foot public utility easement ("PUE") that was designated when the subject property was subdivided as part of the adjoining NASD property. The Design Plan shows the CCT right-of-way between the road right-of-way and the property line, and the PUE within the CCT right-of-way, adjacent to the road right-of-way. See Exs. 28(b) and (c). Technical Staff points out that it whether it is permissible for the PUE to be located within the CCT right-of-way would have to be determined at site plan review. Ex. 23 at 5. Staff also suggests that it might be preferable to locate the PUE adjacent to the property line rather than the road right-of-way, so that future trains or buses would run close to the road, rather than close to residences. The Petitioner's engineer argued that the PUE should be located adjacent to the road right-of-way, as shown, for several reasons: (1) locating the PUE 50 feet from the road right-of-way would require digging a second trench for utility lines 50 feet from the road trench, increasing costs and causing greater environmental damage; (2) the utility companies are accustomed to having utility easements adjacent to road rights-of-way and know best how to work with them in that location; (3) future transit likely would be run down the middle of the 50-foot easement, allowing for some buffer between that use and the adjacent residential buildings; and (4) in its current location, the PUE could serve as a buffer between future transit and the sidewalk. This issue would be decided at site plan review with input from the Maryland State Highway Administration.

Technical Staff identified three critical intersections that could be affected by traffic generated by the proposed development. Staff agreed with the conclusion drawn in the Applicant's traffic study, Exhibit 10, that the traffic anticipated from the proposed development would not, when considered in conjunction with existing and background traffic, result in critical lane volume ("CLV") at any of the intersections studied that would exceed the applicable congestion standard. Ex. 23 at 6. Each of the three intersections, MD 28 at MD 119, MD 28 at Diamondback Drive, and MD 119 at

Decoverly Drive, currently operates below the 1,525 CLV standard and would continue to do so under background conditions and with development of the subject property. Thus, the requirements of Local Area Transportation Review are satisfied.

For purposes of Policy Area Transportation Review, the subject property is located in the R&D Village Policy Area, which has sufficient housing capacity (424 units as of January 31, 2004) to support the proposed development. Moreover, if the preliminary plan application is filed after July 1, 2004, policy area review will no longer be required.

F. Environment and Utilities

The approved Natural Resources Inventory/Forest Stand Delineation ("NRI/FSD"), Exhibit 33, identifies a 100-foot stream valley buffer on either side of the stream that runs through the subject property, as well as a 25-foot wetlands buffer. It also identifies approximately 7.85 acres of forest, including five specimen trees and ten significant trees, plus several specimen trees immediately adjoining the property. Forest cover within the stream valley was considered high priority, which resulted in keeping development out of the stream valley and allowing more development in wetland areas of the site. The Maryland Department of the Environment has issued a water quality certification for the stream crossing associated with extending Decoverly Drive and installing the sidewalk and utilities. The Petitioner would also be required to obtain a permit to fill wetlands for the extension of Decoverly Drive and for any other construction in wetland areas.⁴ The Applicant's engineer expects the necessary permit to be granted because the wetlands are quite narrow at the location of the road crossing, and because current engineering methods allow a culvert to be designed to retain as much of the natural character of the stream as possible, rather than using a pipe system.

The Petitioner plans to retain 2.34 acres of forest on-site, as required under the County's Forest Conservation Law, section 22A-12(f). See Preliminary Forest Conservation Plan, Ex. 34. The Petitioner would also be subject to a reforestation requirement of 1.56 acres. Technical Staff

⁴ Technical Staff indicates that depending on the exact square footage of fill involved, the wetlands permit might come from the Maryland Department of the Environment or the Army Corps of Engineers.

has recommended that the Petitioner meet this requirement on site by enhancing the remaining 2.34 acres of forest in two ways: (1) removing Multiflora rose and other non-native invasive species, and (2) enrichment planting in gaps and open areas of stream and wetland buffers. Technical Staff suggests as a condition of approval that a planting plan be approved by MNCPPC prior to the release of sediment and erosion control permits. In addition, Technical Staff suggests that efforts be made during preliminary plan review to minimize or mitigate impacts on the critical root zones of several healthy specimen and significant trees that are located outside the proposed conservation easement.

The Department of Permitting Services ("DPS") granted a waiver for stormwater quantity control to the entire NASD site, of which the subject property was a part, principally because of proximity to the large stormwater management pond adjacent to the subject property. This waiver requires that water *quality* requirements be met on site, preferably through infiltration methods. The Petitioner did not submit a stormwater concept plan as part of this record, but has submitted a plan to DPS for review. The Petitioner's engineer provided testimony and a written report describing methods that likely would be used to satisfy water quality control. See Tr. at 109-112, Ex. 12 . The drainage areas on the property would be broken up to direct some of the stormwater run-off into the stormwater management pond and some to the on-site wetland areas. Run-off would be directed through sand and gravel infiltration facilities and/or bio-retention facilities to allow for water quality treatment and groundwater recharge, prior to release of remaining water into the pond or wetlands. The Petitioner also proposes to seek credit for a portion of its water quality control requirement by placing a conservation easement on flood plain areas of the site. The Petitioner's engineer opined that stormwater management requirements can be met.

Water and sewer lines are available within close proximity to the subject property. Electric, gas and telephone utilities are also available in the immediate area, and any other utilities necessary may reasonably be expected to be available, given the site's close proximity to sizeable residential and commercial developments.

III. SUMMARY OF TESTIMONY

A. Petitioner's Case

1. Alfred Blumberg, land planner.

Mr. Blumberg was designated an expert in land planning. He first described the subject property and its location, using an aerial photograph (Ex. 9). He explained that the subject property consists of two parcels that were designated parcels MM and NN, respectively, as part of a larger subdivision. Mr. Blumberg agreed with Technical Staff's description of the neighborhood and described the existing land uses within that neighborhood. He opined that the special exception proposed here would be consistent with the objectives of the Master Plan, which include providing a broad mix of residential units, among them affordable housing, for the many workers who would be attracted by the commercial development called for. Mr. Blumberg acknowledged that the Master Plan's Land Use Plan includes the subject property in an area recommended for commercial development under the O-M Zone, but he noted that the use proposed here is permitted in the O-M Zone by special exception, and is consistent with the recommendations in the text of the Master Plan. He emphasized that the proposed development would be a continuation of an existing multi-family residential development on the other side of Decoverly Drive, and would be compatible with the Master Plan's recommendations for residential density on surrounding properties.

Mr. Blumberg described the proposed development, which would consist of 196 dwelling units. The development would have 28 units at the south end of the site and 168 units at the north end, separated by a forested area containing a stream and wetlands. All development would be outside of the wetlands and flood plains, and would satisfy the County's Environmental Guidelines. The development would have a density of 18.1 dwelling units per acre, which is lower than the maximum density of 21.5 d.u./acre that the Zoning Ordinance permits in a development where 35 percent of the units qualify as productivity housing. Mr. Blumberg opined that the three- and four-story buildings in the development would be architecturally compatible with nearby residential and commercial developments. He noted that the Petitioner proposes to provide more parking than the

Zoning Ordinance would require because the Petitioner believes that the County's requirement is sub-standard for today's apartment dwellers. Tr. at 37-38.

Mr. Blumberg testified that the Petitioner proposes to install five signs: two at each of the two driveway entrances and a fifth at the intersection of Decoverly and Diamondback Drives. He described on-site recreational facilities including tot lots, a tennis court and a gazebo.

The Petitioner would be required to extend Decoverly Drive from its existing terminus, which is about one-third of the distance from the southern end of the subject property to the northern end, so that it extends to the northern boundary of the property. The Petitioner proposes to transition the existing four-lane section of Decoverly Drive down to two lanes, one in each direction. In addition, the Design Plan provides for a wide sidewalk along the extended Decoverly Drive to provide easy pedestrian access between the two development areas.

Mr. Blumberg further opined, based on the reasoning outlined in his written report, Exhibit 19(a), that the proposed special exception would satisfy all of the general and specific findings applicable to the use. Tr. at 46-47.

2. Robert Koontz, landscape architect

Mr. Koontz was designated an expert in landscape architecture. He described the Landscape Plan for the proposed development, Exhibit 28(d), and Landscape Details, Exhibit 28(e). He testified that the proposed development would satisfy all Montgomery County requirements for parking lot landscaping and street trees, and would provide enhanced landscaping in the amenity areas that loop around among the buildings. This would include shade trees, ornamental trees, shrubs, grasses and perennials, as well as areas with special paving and sidewalks. The landscaping plan includes buffers along the northern border with the Crown Farm, consisting of shade trees planted along the backs of the garages and evergreen shrubs along the parking spaces between the garages.

Mr. Koontz noted that the Petitioners plan to construct an eight-foot sidewalk along most of the subject property's Decoverly Drive frontage, which would narrow gradually to connect with the five-foot sidewalk that currently exists along the portion of Decoverly Drive that has already been

built. The plans also include pedestrian connections among the residential buildings and center courtyard within parcel MM, at the north end of the site. He testified that the planning team explored the possibility of creating an additional pedestrian path through the stream valley buffer between parcel MM and parcel NN, but decided that the area was too environmentally sensitive to make an additional crossing separate from the one needed to extend Decoverly Drive. Widening the road crossing to accommodate a sidewalk would have less environmental impact than a separate crossing at another location. He testified that Technical Staff agreed with this conclusion.

Mr. Koontz described the lighting plan, and in particular a change that was made at the request of Technical Staff to include lighting shields on the side of each pole fixture that would face the proposed buildings, to protect residents from unwanted illumination or glare. He noted that the submitted photometrics do not reflect the decrease in illumination levels that would result from adding house-side shields, which are also shown along the Crown Farm property line. Even without the use of partial shields, the illumination level does not exceed 0.1 foot candles along any of the property lines (except near existing street lights on Diamondback Drive). Mr. Koontz opined that the proposed lighting would not cause any adverse impacts in terms of glare or light spillage.

Mr. Koontz described on-site recreational amenities including a tennis court, a tot lot, seating and picnic areas, an open lawn area for play and a gazebo overlooking the stormwater management pond. The residents of the proposed development would also have access to additional facilities nearby at Decoverly Phase I, where the Petitioner plans to convert an existing clubhouse with a small fitness facility into a residents' lounge and build a new, 1,300-square-foot fitness facility next door. Mr. Koontz opined that the recreational amenities as proposed would meet county standards (applied by the Planning Board at site plan review) and would be adequate for the proposed residential community.

Mr. Koontz testified that the sign proposed for the corner of Diamondback and Decoverly Drives would complement the existing sign for Decoverly Phase One that sits across the street. The face of the sign would conform to the county Sign Ordinance in size, and would be supported by a stone or masonry wall measuring approximately six feet high and 15 feet long. It

would be uplit by small lights installed on the ground in front of the sign, which would focus on the face of the sign. In the event that for some reason a sign variance were found necessary, the Petitioner agreed to submit to the Board a picture of the sign as approved and a copy of the approval.

Finally, Mr. Koontz opined that with the buffers provided by the proposed landscaping, the development would be compatible with adjacent development. He noted that the proposed development would be very similar to Decoverly Phase One in style and character and would be very compatible with the neighborhood.

3. Edward Wallington, engineer

Mr. Wallington was designated an expert in civil engineering. He testified that his firm updated the NRI/FSD that had been prepared for the earlier subdivision that included the subject property, and did preliminary feasibility evaluations for engineering elements such as sewer and water services and stormwater management. Mr. Wallington identified the forest cover in the existing stream valley area as high priority forest, while the wetland areas either were not forested or did not contain high priority forest. As a result, environmental buffers focused on protecting the high priority forest in the stream valley buffer. The approved NRI/FSD delineates a 100-foot buffer on either side of the stream valley and a 25-foot buffer on either side of wetlands. These buffers are combined to form a line labeled "SVB" on the NRI/FSD, which follows the more restrictive of the two buffers as it winds through the site, thereby identifying the environmental constraints on the property.

Mr. Wallington noted that the proposed extension of Decoverly Drive would require a wetlands permit from the Maryland Department of the Environment. That permit has been filed and Mr. Wallington expects it to be granted. This would be a significant stream crossing, but the location of the road is at a point where the wetlands are quite narrow, so a they should be able to design a culvert that basically allows for a free-flowing stream under the road rather than a pipe system. The Petitioner agreed, via counsel, to submit a copy of the final wetlands permit to the Board for the record, although this approval would be issued long after the Board's decision.

Mr. Wallington testified that under county forest conservation requirements, the Petitioner would be required to plant about 1.5 acres of trees. They proposed to do that planting off-site, but Technical Staff recommended instead that they meet the planting requirement by implementing an invasive-species plan to enhance the on-site forest. This would involve removing or controlling the spread of invasive species and planting trees in some areas that lack the desired forest cover. The Petitioner has no objection to this recommendation.

Mr. Wallington testified that public water and sewer connections are easily available in the vicinity of the subject property, as well as a network of power and telephone utility services. Mr. Wallington also responded to a suggestion made by Technical Staff concerning the placement of the ten-foot-wide public utility easement ("PUE") to be established along Decoverly Drive, to provide space for utility extensions for the new development. The Petitioner's plans show the PUE – which has already been approved as part of the earlier subdivision – adjacent to the right-of-way for Decoverly Drive, within a 50-foot area that is reserved for future use as part of the planned Corridor Cities Transitway. Technical Staff suggested that the CCT right-of-way should be adjacent to the roadway right-of-way, with the PUE between the CCT right-of-way and the development, to provide a buffer between the future transit use – expected to be light rail or buses – and the development area. Mr. Wallington argued that the PUE should be located adjacent to the road right-of-way, as shown, for several reasons: (1) locating the PUE 50 feet from the road right-of-way would require digging a second trench for utility lines 50 feet from the road trench, increasing costs and causing more environmental damage than widening a single trench by ten feet; (2) the utility companies are accustomed to having utility easements adjacent to road rights-of-way and know best how to work with them in that location; (3) future transit likely would be run down the middle of the 50-foot easement, allowing for some buffer between that use and the adjacent residential buildings; and (4) in its current location, the PUE could serve as a buffer between future transit and the sidewalk.⁵

⁵ Mr. Wallington was not asked to address Technical Staff's comment that it may not be permissible to locate the PUE *within* the CCT right-of-way.

With regard to stormwater management, Mr. Wallington testified that a concept plan has been submitted to the Department of Permitting Services, and approval is required before preliminary plan and site plan review. Mr. Wallington opined that the Petitioner would be able to satisfy both quantity and quality stormwater management requirements for the subject property. For parcel MM, the concept stormwater management plan would use the existing pond just uphill of the subject property. Under current stormwater managements standards, additional measures would be required to provide for groundwater recharge and to upgrade water quality treatment before draining into the wetlands. In addition, the drainage areas would be broken up to meet quantity control requirements.

Finally, Mr. Wallington opined that the proposed development would have no adverse impact on surrounding properties from a civil engineering perspective.

4. Betsey Weingarten, Petitioner's representative.

Ms. Weingarten testified on behalf of the Petitioner that all of the conditions of approval recommended by Technical Staff are acceptable. She described the Petitioner as a company that develops and managements apartment communities throughout the country and therefore has a great deal of experience in that arena. She stated that they have found it preferable to centralize major recreational amenities, like the lounge and fitness center proposed on the Decoverly Phase One property, because a single, larger facility creates a better sense of community than smaller, scattered facilities. She testified that a community manager would be located in the renovated clubhouse/lounge to supervise both Phase One and Phase Two.

Ms. Weingarten noted that her company typically provides parking well in excess of the county requirements because in their experience, adequate parking is extremely important to residents and neighbors of apartment communities. They like to have 1.7 to 1.8 parking spaces per unit for garden apartments. In this case, the proposed community would not have any three-bedroom units and would have 106 one-bedroom units out of the total of 196 units, so the Petitioner is comfortable with the proposed ratio of 1.67 parking spaces per unit.

Ms. Weingarten provided more detail concerning the sign proposed at the corner, noting that under current company policies it would say, simply, “Avalon at Decoverly”, with the corporate logo.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards, both specific and general, are met. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Based on the testimony and evidence of record, I conclude that the proposed special exception for dwellings in a commercial zone would satisfy all of the specific and general requirements for the use.

A. Inherent and Non-inherent Adverse Effects

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. The Zoning Ordinance permits dwellings by special exception in certain commercial and industrial zones. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with dwellings in a commercial or industrial zone. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed

use that are not consistent with the characteristics thus identified, as well as adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following may be considered inherent characteristics of dwellings in a commercial or industrial zone: residential structures, parking facilities, recreational facilities, pedestrian linkages, exterior lighting for vehicular and pedestrian access, and traffic associated with residents' activities. The Hearing Examiner agrees with Technical Staff's conclusion that the physical and operational characteristics of the development proposed in this case are consistent with the inherent characteristics identified. The proposed development would have three- to four-story buildings, surface and garage parking, pedestrian paths and sidewalks, lighting for the parking areas and walkways, and recreational amenities including tennis courts, a tot lot, picnic and seating areas and a gazebo. All of these are typical for a residential development. The only operating characteristic of significance in terms of neighborhood impact would be traffic, which, in this case, is not expected to be unusual in type or volume so as to create a non-inherent characteristic. No unusual site conditions have been identified that could give rise to adverse effects. Thus, the Hearing Examiner finds that the proposed development would have no non-inherent adverse effects.

B. Specific Standards

The specific standards for a Dwelling special exception are found in Code § 59-G-2.36.2. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the proposed apartment complex would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.36.2. Dwellings.

- (a) Dwellings in a commercial or industrial district must be compatible with existing or planned development on the same lot or tract and be compatible with the surrounding area. Dwellings developed in a commercial or industrial district may be combined with proposed or existing office, retail or industrial development or may be developed in lieu of non-residential development, provided there remains adequate land zoned for such development to serve the immediate neighborhood.

Conclusion: The proposed development would create a mixed-income apartment community providing attractive, convenient housing, with a third of the units income-restricted, in close proximity to nearby employment and commercial centers. Technical Staff found that the proposed development would complement and enliven the nearby commercial uses, and would be compatible with nearby residential uses. The three- to four-story buildings would be compatible in terms of height with the two- to five-story office buildings in the NASD complex, which is separated from the subject property by a two-acre stormwater management pond. The nature of the use would be compatible with adjoining residential uses, which are a mix of multi-family apartment buildings and townhouses. The proposed development would be owned and managed as a sister community to the Avalon apartment community across Decoverly Drive, so it would be in the Petitioner's interest to maintain compatibility between the two. Moreover, the large area to be maintained in forest, stream valley and wetlands would preserve a visual and open space amenity for the neighborhood.

The proposed development would have a density of 18.1 dwelling units per acre, which is slightly higher than the density of Avalon at Decoverly One, 14.7 d.u./acre. The proposed density is considerably higher than that in the nearby Decoverly Townhouses, which is currently about 5.5 d.u./acre and is planned to top off at approximately 10.2 d.u./acres at full build-out. See Ex. 38. However, the density proposed here is lower than the density of 20-25 d.u./acre recommended in the Master Plan for the western portion of the Crown Farm, which would be due north of the subject property. Considering the totality of the evidence, the Hearing Examiner is persuaded that the proposed development would be compatible with existing and planned development in the surrounding area.

Technical Staff opined, and the Hearing Examiner agrees, that adequate land would remain zoned for non-residential development within the surrounding area, even with the use of the subject property for residential purposes. The NASD subdivision was approved for a total of roughly 940,000 square feet of office space, including approximately 200,000 square feet of office on the subject property. To date, approximately 620,000 square feet have been constructed and one

parcel remains with 105,000 square feet approved. In addition, the undeveloped property adjacent to the southwest contains approximately 12 acres of land classified under the I-3 Zone (Technology & Business Park).

(b) Dwellings in a commercial or industrial district are subject to the following standards:

- (1) Not more than twenty-five percent (25%) of the land which is either zoned or recommended for commercial or industrial zoning in the applicable approved and adopted master plan may be used for housing.

Conclusion: Technical Staff found that in light of the very large land area in commercial zoning in the Shady Grove Study Area, it is apparent that the ten-acre property at issue here represents less than 25 percent of the land that is zoned or recommended for commercial or industrial zoning. See Supplemental Staff Report, Ex. 41. The Petitioner notes that the Master Plan designates over 750 acres of land for primarily R&D uses in the vicinity of the Life Sciences Center, and that the subject property is the only property zoned O-M within the planning area for which residential uses have been proposed. Based on this undisputed evidence, the Hearing Examiner finds that the proposed special exception would not result in more than 25 percent of the land that is either zoned or recommended for commercial or industrial zoning being used for housing.

- (2) Dwellings in a commercial or industrial district must meet the development standards of the applicable zone concerning minimum setbacks, green area, and lot coverage. The base residential density is 6.0 units per acre, which may be increased up to 21.5 units per acre if at least 35 percent of the units are productivity housing for households with incomes at and below the area wide median income, as provided for in Chapter 25B, Article IV, of the County Code. The maximum height allowed in the applicable commercial zone may be adjusted not to exceed a total height of 50' to accommodate residential development above a commercial structure as authorized under Sec. 59-G-1.23. These standards apply to all buildings on a site, including those that contain housing. The required green area may be adjusted to assure compatibility of uses, or to accommodate housing if not otherwise feasible or appropriate.

Conclusion: The evidence establishes that the proposed development would satisfy the development standards of the O-M Zone, as summarized in the following table⁶:

Development Standard	Required	Proposed
Minimum setbacks		
From public streets	15 ft.	30 ft. from Diamondback Dr., 135 ft. from Decoverly Dr.
From transit ROW	50 ft.	85 ft. from CCT
From adjacent residential use	1' horiz./3 ft. bldg. ht.	
Crown Farm to garages	5 ft. min.	12 ft.
Crown Farm to 3-story buildings	18 ft. min.	20 ft.
Crown Farm to 4-story buildings	20 ft. min.	20 ft.
Maximum building coverage	60%	16% on MM, 6% on NN
Maximum building height	60 ft./5 stories	50 ft.
Minimum greenspace	10%	54.8% on MM, 80.7% on NN
Minimum internal parking greenspace	5%	9.1% on MM, 14.6% on NN
Minimum number of parking spaces	268	274 full-size, 327 total

The evidence also establishes that the proposed development, with a density of 18.1 dwelling units per acre, would not exceed the maximum residential density permitted. No adjustments to height or green area requirements are requested.

- (3) Access must be provided by one or more direct driveways to a public street. The entrance must be located and appropriately lighted to assure safe access for residents, whether or not commercial or industrial uses on the same lot are in operation.

Conclusion: The proposed development would have access to Decoverly Drive, a public street, from two driveway entrances. These entrances would be separate from the access points for other nearby commercial and residential uses and are not expected to cause access conflicts. The evidence establishes that these entrances would be appropriately lit with 12-foot pole lights.

⁶ All development standards are listed, not just those identified in this specific condition, because under § 59-G-1.23, special exceptions must satisfy the development standards of the zone.

- (4) A minimum of one (1) on-site parking space per dwelling unit must be provided. Additional parking spaces must be provided up to the total required by the relevant standards of Section 59-E-3.7, except that the Board may approve shared parking in accordance with the provisions of Section 59-E-3.1 to accommodate these additional spaces.

Conclusion: With 274 full-size parking spaces and an additional 53 compact- spaces, the proposed development would have a ratio of 1.67 parking spaces per dwelling unit, which is considerably more than required under this paragraph or Section 59-E-3.7. No shared parking is proposed.

- (5) The property must be located in an area served by public water and sewer and must be in water and sewer categories 1, 2, or 3.

Conclusion: Technical Staff reports that the subject property is served by public water and sewer and is in Water Category 3 and Sewer Category 3.

(c) Design plan.

- (1) In addition to submitting such other information as may be required, a design plan of proposed development must also be submitted at the time the application is made. The design plan must show the size and shape of the subject property, the location of all buildings and structures, the area devoted to parking, any recreation facilities to be provided, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.

Conclusion: Exhibits 28(a) through (c) constitute the primary components of the Design Plan in this case, showing the size and shape of the subject property, the location of all buildings and structures, the area devoted to parking, recreational facilities, access roads and drives, topography and major vegetation features, and basic grading plans. Additional exhibits that make up the whole of the Design Plan include the Landscape Plan, Exhibit 28(d), the Landscape Details plan, Exhibit 28(e) and four exhibits pertaining to lighting: the Overall Lighting Plan, Exhibit 28(f), the Shield Layout, Exhibit 28(g), the House Side Shield, Exhibit 28(h), and the Pole Light Fixture, Exhibit 28(i). Taken together, these exhibits satisfy this specific condition and allow full evaluation of the plan.

- (2) No special exception, building permit or certificate of occupancy may be granted or issued except in accordance with a design plan of development approved by the Board of Appeals. The Board may condition its approval of a design plan on such amendments as determined necessary to assure an internally compatible development which will have no adverse effect on the surrounding community.

Conclusion: The Hearing Examiner agrees with the conclusion drawn by Technical Staff and the Petitioner's land planner that the Design Plan as submitted would result in an internally compatible development that would have no adverse effect on the surrounding community. The development would have an attractive and functional design, and would blend well with the existing mix of uses in the neighborhood.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). Based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed use would be consistent with these standards, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
 - (1) Is a permissible special exception in the zone.

Conclusion: Dwellings are a permitted use in the O-M Zone by special exception.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with each of the standards and requirements set forth for the use in Code §59-G-2.36.2, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special

exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The Hearing Examiner agrees with Technical Staff's conclusion that the proposed special exception would be consistent with the *Shady Grove Study Area Master Plan*. Although the subject property is designated on the Master Plan's Land Use Plan for office use, its use for residential dwellings would help to implement one of the important objectives stated in the text of the Master Plan, which has not been fully implemented to date. Technical Staff's findings in this regard are persuasive evidence that, viewing the Master Plan as a whole, the proposed project would be consistent with the Master Plan.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The Hearing Examiner agrees with Technical Staff's conclusion that the proposed special exception would be in harmony with the general character of the neighborhood. The proposed development would increase population density somewhat, but not beyond the levels anticipated in the Master Plan, and not to a degree that should be considered incompatible. Technical Staff opined, and the Hearing Examiner agrees, that the design, scale and bulk of the proposed buildings would be consistent with existing structures in the neighborhood. The intensity and character of activity would be consistent with the levels of activity already experienced in the neighborhood, which has a high level of residential and non-residential development. The Petitioner's traffic study demonstrated that the local roadway network can adequately accommodate the traffic expected from the proposed development. The Petitioner plans to provide ample parking, with little likelihood of adverse effects on the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that due to the compatibility of the proposed development with the character of the neighborhood, and the absence of non-inherent adverse effects, the proposed special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. The proposed exterior lighting is not unusual for residential developments and would not result in objectionable glare or light spillage. The noise and physical activity that may be expected from an apartment community of this size are consistent with the inherent characteristics of a residential dwelling use and therefore should not be considered objectionable in this context.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Technical Staff notes that there are no existing special exceptions in the surrounding neighborhood (Ex. 23 at 3). The neighborhood was defined broadly and includes a mix of commercial uses, townhouses, rental apartments and farmland. Thus, it is not primarily residential in nature. Moreover, the evidence supports the conclusion that the proposed development, placing additional multi-family housing in between existing multi-family housing and a large office complex,

would not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter its character.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would not adversely affect the general welfare of residents, visitors and workers in the area of the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property, located in close proximity to substantial residential and commercial development, would be served by adequate public facilities and would have no adverse effect on such facilities. Technical Staff did not address possible impact on public schools. The Petitioner's undisputed evidence, however, establishes that in July 2003, the County Council declared the capacity for all schools in the Gaithersburg cluster, which would receive students from the proposed development, to be adequate.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would be required before building permit approval.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence supports Technical Staff's conclusion that the proposed access points would be safe and efficient, and the conclusion drawn by the Petitioner's traffic expert that the proposed development would have no adverse effect on vehicular or pedestrian traffic.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.
- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: As discussed above, the Petitioner has met its burdens of proof and persuasion in this case.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2597, which requests a "Dwellings" special exception to build and manage a rental apartment community on property classified under the O-M Zone, located at the northeast corner of Diamondback Drive and Decoverly Drive in Gaithersburg, Maryland, be **granted** with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of the Petitioner's witnesses and representations of counsel identified in this report, including the Design Plan and Landscape Plan, Exhibits 28 (a) through (d).
2. The special exception must be limited to a total of 196 units, including 35 percent productivity housing units.

3. The Petitioner must obtain approval of an amended preliminary plan of subdivision and site plan from the Planning Board prior to the release of any building permit.
4. The Petitioner must comply with the stormwater and sediment control regulations of the Montgomery County Department of Permitting Services ("DPS"), and must obtain DPS approval of a stormwater management concept plan before the Planning Board hearing on the preliminary plan.
5. Identification signage shall be limited to five signs, two at each of the driveway entrances and one near the corner of Diamondback and Decoverly Drives. Sign lighting must not result in illumination greater than 0.1 foot candles across any property line.
6. The Petitioner must submit to the BOA a copy of the sign permits obtained and any variance required, as well as a visual representation of the signs erected.
7. The Petitioner must submit to the BOA a copy of the final wetlands permit.
8. The Petitioner must comply with the conditions approval of the Forest Conservation Plan prior to release of sediment and erosion control permit.

Conditions of approval shall include treating the tree save area by:

- a. Removal of Multiflora rose (*Rose multiflora*) and other non-native invasive species;
- b. Enrichment planting in gaps and open areas of stream and wetland buffers; and
- c. Approval of a planting plan by MNCPPC prior to the release of sediment and erosion control permits.

Dated: May 4, 2004

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner